

FEDERAL ENDANGERED SPECIES ACT, CALIFORNIA ENDANGERED SPECIES ACT, AND NATURAL COMMUNITY CONSERVATION PLANNING ACT

The CALFED agencies have developed a two-tiered approach for compliance with the federal Endangered Species Act of 1973 (FESA), California Endangered Species Act (CESA), and the Natural Community Conservation Planning Act (NCCPA). The first tier is a program-level evaluation of the CALFED Preferred Program Alternative under FESA and the NCCPA that was presented in CALFED's Multi-Species Conservation Strategy (MSCS). The second tier is project-level compliance for individual actions or groups of actions using a multi-purpose project-level environmental document called an "action specific implementation plan" (ASIP), which was designed for this purpose. This programmatic process was developed specifically to facilitate compliance for CALFED actions and is different from the processes that would be required for compliance with FESA, CESA, and the NCCPA for non-CALFED actions. It is therefore explained here in more detail than has been provided for other regulatory processes described in this guide.

ORGANIZATION OF THIS SECTION

This section is organized as follows:

- Overview—Describes the general requirements of FESA, CESA, and the NCCPA.
- Program-Level Compliance for the CALFED Preferred Program Alternative—Describes the components of CALFED's first-tier (program-level) compliance with FESA and the NCCPA:
 - [the MSCS](#);
 - the agreement defining the CALFED agencies' mutual commitments for complying with FESA, CESA, and the NCCPA for CALFED actions;
 - the programmatic biological opinions issued by the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS); and
 - the California Department of Fish and Game's (DFG's) approval and support of findings for the MSCS.
- Tiered Project-Level Compliance: Action Specific Implementation Plans—Describes the process for project-level compliance for CALFED actions. This discussion
 - provides an overview of the project-level compliance process,
 - describes the "focus area" addressed by the MSCS,

- explains the types of goals that the CALFED agencies established for the species evaluated in the MSCS,
- explains how the term “covered species” is used in relation to FESA and NCCPA compliance for CALFED actions and generally describes how lead agencies/project proponents would address species that are not covered by the CALFED program-level documents,
- describes the difference between the two types of conservation measures identified in the MSCS and how to incorporate these into project-level compliance,
- describes the compliance process for CALFED actions implemented by federal agencies and those implemented by State agencies,
- explains implementing agreements, and
- describes the relationship of FESA Section 10 and CESA Section 2081 to the MSCS/ASIP compliance process.

“**Incidental take**” of a listed species is take that would result from, but would not be the purpose of, an otherwise lawful activity.

These sections are followed by answers to the following questions:

- Who Needs to Comply?
- How Long Does the Approval Process Take?
- What Information Does the Applicant Need to Provide?
- What Does the Application and Evaluation Process Entail?
- Does the Process Trigger the Need for Compliance with Other Regulations?
- What Are the Opportunities for Facilitating Compliance with This Process?

OVERVIEW

FEDERAL ENDANGERED SPECIES ACT. USFWS and NMFS administer FESA. FESA requires USFWS and NMFS to maintain lists of threatened and endangered species and provides for substantial protections for “listed” species. NMFS’s jurisdiction under FESA is limited to the protection of marine mammals and fishes and anadromous fishes; all other species are within USFWS’s jurisdiction.

Section 9 of FESA prohibits the take of endangered species and prohibits the violation of any regulations that prohibit the taking of threatened species. Actions implemented in accordance with a Section 7 biological opinion and an incidental take statement are not subject to Section 9’s take prohibition. All other actions that would result in the take of a listed species require a permit issued under Section 10 of FESA, the most common of which is an “incidental take permit”. Section 10 allows USFWS or NMFS, under certain conditions, to issue incidental take permits for actions whose purpose is not to take listed species, but for which it is

impracticable to avoid a take. To obtain an incidental take permit, an applicant must meet certain requirements, including a requirement to prepare a habitat conservation plan (HCP) that analyzes and explains an action's impacts on listed species. The HCP also must, among other things, discuss measures to minimize and mitigate the impacts, identify funding, and include a monitoring plan.

CALFED actions generally will be required to comply with Section 7 of FESA rather than Section 10 because most CALFED actions will be funded at least in part by a federal agency or will require a permit or approval from a federal agency. The MSCS (described below under "Program-Level Compliance for the CALFED Preferred Program Alternative") can be used to fulfill the requirements of Section 10 for CALFED actions. However, because CALFED actions usually will not involve compliance with Section 10, this guide focuses on how the MSCS may be used to comply with Section 7.

Section 7 of FESA requires all federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. To ensure that their actions do not result in jeopardy to listed species or adverse modification of critical habitat, each federal agency must consult with USFWS or NMFS, or both, regarding federal agency actions. If a Federal agency determines that an agency action may affect listed species or critical habitat, then it must request initiation of formal consultation with USFWS, NMFS, or both, depending on the affected species. The consultation is initiated when the federal agency submits a written request for initiation to USFWS or NMFS, along with the agency's biological assessment of its proposed action. If a Federal agency determines, with the written concurrence of the USFWS, NMFS, or both, as appropriate, that an action may affect but is not likely to adversely affect listed species or critical habitat, then no further consultation is required under FESA. Otherwise, USFWS or NMFS—or both—must prepare a written biological opinion describing how the agency's action will affect the listed species and its critical habitat.

"Jeopardy" is a term that means a Federal agency action would threaten the continued existence of a listed species or adversely modify the species' critical habitat.

"Take" means to harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect a listed species. Harm includes actions, such as significant habitat modification, that kill or injure listed species.

If the biological opinion concludes that the proposed action would jeopardize the continued existence of a listed species or adversely modify its critical habitat, the opinion must suggest "reasonable and prudent alternatives" that would avoid that result, if any. If the biological opinion concludes that the project as proposed would involve the take of a listed species, but not to an extent that would jeopardize the species' continued existence, the opinion must include an "incidental take statement". The incidental take statement must specify an amount of take that may occur as a result of the action and suggest reasonable and prudent measures to minimize the impact of the take. If the action complies with the biological opinion and incidental take statement, it may be implemented without FESA being violated. USFWS and NMFS cannot issue an incidental take permit for an action that would warrant a jeopardy opinion under Section 7.

CALIFORNIA ENDANGERED SPECIES ACT. DFG administers CESA for all native species of fish, plants, and wildlife. CESA requires that DFG maintain lists of threatened and endangered species and provides for the protection of species on these lists.

CESA does not include a consultation process for State agencies, as FESA Section 7 does for federal agencies.

Like FESA, CESA prohibits the take of any listed species—in this case, those on CESA’s list of endangered or threatened species. As under Section 10 of FESA, CESA Section 2081 requires that an incidental take permit be obtained for any project that would result in the take of a listed species. The requirements for obtaining an incidental take permit under CESA are similar—but not identical—to the requirements for obtaining an incidental take permit under FESA. For example, CESA does not specifically require the preparation of an HCP. However, like FESA, CESA generally requires an applicant to analyze and explain the project’s impacts on listed species, identify measures to mitigate the impacts of taking the listed species, identify funding for implementation, and include a monitoring plan. Similar to USFWS and NMFS procedures under FESA, DFG cannot issue an incidental take permit for an action if that action would jeopardize the continued existence of a listed species.

Ordinarily, federal agencies are not subject to CESA and are not required to obtain CESA incidental take permits for federal agency actions; CESA generally applies only to entities and individuals.

NATURAL COMMUNITY CONSERVATION PLANNING ACT. The NCCPA authorizes and encourages conservation planning on a regional scale in California. The NCCPA addresses the conservation of natural communities as well as individual species. The mechanism for this regional conservation is the development of natural community conservation plans (NCCPs) that provide for early coordination efforts to protect natural communities, including listed species or species that are not yet listed. To be approved by DFG, an NCCP must adequately conserve species and natural communities within the plan area rather than minimize and mitigate the impacts of taking a listed species caused by individual projects that are carried out within the plan area, as is required under FESA and CESA. The NCCPA also provides an alternative to incidental take permits under CESA. Under the NCCPA, DFG may issue “NCCPA authorizations” for actions that would result in the take of any species, including listed species, that are adequately conserved by an approved NCCP.

Within the context of the CALFED PPA, “adequately conserve” means to use conservation methods and procedures that are adequate to protect and perpetuate a species of fish, plant, or wildlife within the MSCS focus area, taking into consideration the whole of CALFED, including the direct and indirect effects of CALFED actions.

The NCCPA’s focus on regional conservation, rather than individual project mitigation, is appropriate for a complex and extensive program like CALFED and is more easily integrated with FESA’s Section 7 process than CESA’s incidental take permitting process would be. In some instances, a CESA incidental take permit may be required for CALFED actions (see below under “[Species Not Covered by the Program-Level Compliance Documents](#)”). However, most CALFED actions can comply with both CESA and the NCCPA by obtaining an NCCPA

authorization. This section describes how NCCPA authorizations can be obtained for CALFED actions.

It is important to note that while NCCPA authorizations may be used to comply with CESA, they cannot be used to comply with FESA. CALFED actions must comply with FESA either through the Section 7 consultation process or the Section 10 permitting process. In addition, like CESA, the NCCPA does not ordinarily apply to federal agencies.

PROGRAM-LEVEL COMPLIANCE FOR THE CALFED PREFERRED PROGRAM ALTERNATIVE

Five documents establish CALFED's program-level compliance with FESA and the NCCPA:

- CALFED Bay-Delta Program Multi-Species Conservation Strategy
- Conservation Agreement regarding the CALFED Bay-Delta Program Multi-Species Conservation Strategy
- USFWS's Programmatic Biological Opinion on the CALFED Bay-Delta Program
- NMFS's CALFED Bay-Delta Program Programmatic Biological Opinion
- DFG's Natural Community Conservation Planning Act Approval of the CALFED Bay-Delta Program Multiple Species Conservation Strategy

Collectively, these documents cover the jurisdictions of USFWS, NMFS, and DFG, and they fulfill the various requirements of FESA and the NCCPA pertaining to the CALFED Preferred Program Alternative. USFWS, NMFS, DFG, and CALFED have coordinated their efforts to ensure that the documents create a single, coherent approach for regulatory compliance.

While separate regulatory approvals from all three agencies will be required for many CALFED actions, these program-level compliance documents create a single compliance process that may be used for all three approvals. The program-level compliance documents also help ensure that the species and habitat conservation measures necessary to obtain approvals from each agency are consistent and compatible, and are not duplicative.

CALFED MULTI-SPECIES CONSERVATION STRATEGY. The MSCS is an appendix of the CALFED Bay-Delta Program Final Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/EIR) that explains how CALFED will meet the requirements of FESA, CESA, and the NCCPA. The MSCS draws on key elements of the Preferred Program Alternative, such as the Ecosystem Restoration Program (ERP) and the Environmental Water Account (EWA), to outline a comprehensive strategy for the conservation of numerous species of fish, wildlife, and plants and their habitats. The MSCS presents a program-level environmental analysis of the Preferred Program Alternative that expands upon the PEIS/EIR analysis to address the conservation strategy and certain other issues pertinent to FESA and NCCPA compliance. The MSCS served as the program-level biological assessment

of the Preferred Program Alternative for purposes of initiating consultations with USFWS and NMFS under Section 7 of FESA. The MSCS also was submitted to DFG for approval as a program-level NCCP for the Preferred Program Alternative. Each of the FESA and NCCPA program-level compliance documents is based on the MSCS.

The MSCS creates a two-tiered approach to FESA and NCCPA compliance that corresponds to CALFED's two-tiered approach to compliance with NEPA and CEQA. The first tier of compliance is embodied in the MSCS itself and in the program-level compliance documents. For the second tier, the MSCS outlines a single project-level compliance process for both FESA and the NCCPA that complements the second-tier project-level environmental review of CALFED actions under NEPA and CEQA.

For first tier or program-level compliance, the MSCS identifies 244 "evaluated" species and 20 natural communities (habitat types) that could be affected by CALFED actions, establishes conservation goals for each species and natural community, and identifies conservation measures necessary to achieve the goals. This first tier of compliance is intended to ensure that, at the program level, the Preferred Program Alternative will not jeopardize the continued existence of listed species or destroy habitat critical to their survival, as required by FESA Section 7, and will conserve certain evaluated species, as required by the NCCPA.

For the second tier of compliance, the MSCS explains how individual CALFED actions can be designed to comply with FESA and the NCCPA and can be analyzed and authorized in a single, multi-purpose compliance process. The MSCS's project-level compliance process centers on use of the ASIP, a multi-purpose project-level environmental document that is intended to provide one format for all information necessary to initiate project-level compliance with FESA and the NCCPA. An ASIP must be prepared for any CALFED action that may adversely affect a covered species (see "Covered Species" below for an explanation of covered species).

[Appendix B](#) lists the species evaluated in the MSCS. [Figure 5](#) illustrates the relationship between compliance with FESA, CESA, and the NCCPA for the CALFED Preferred Program Alternative and for individual CALFED actions.

CONSERVATION AGREEMENT REGARDING THE MULTI-SPECIES CONSERVATION STRATEGY. The Conservation Agreement Regarding the Multi-Species Conservation Strategy (Conservation Agreement), dated August 28, 2000, defines the CALFED agencies' mutual commitments with respect to the MSCS and the process for complying with FESA, CESA, and the NCCPA for CALFED actions. The Conservation Agreement applies to the:

- USFWS,
- U.S. Bureau of Reclamation,
- Bureau of Land Management,
- U.S. Environmental Protection Agency,
- U.S. Army Corps of Engineers,
- Natural Resources Conservation Service,
- NMFS,

- California Resources Agency,
- California Department of Water Resources, and
- DFG.

In the Conservation Agreement, each agency agrees that if it approves, funds, or implements a CALFED action, it will ensure that the action follows and adheres to the MSCS and the other program-level compliance documents. Ordinarily, this will entail the preparation of an ASIP. However, the Conservation Agreement clarifies that an ASIP is not required for a CALFED action if the agency that approves, funds, or implements the action determines—with the written concurrence of USFWS, NMFS or DFG, as appropriate—that the action is not likely to adversely modify critical habitat designated pursuant to FESA or adversely affect a covered species (see “Covered Species” below for an explanation of covered species). USFWS, NMFS, and DFG have agreed to coordinate their review of ASIPs.

Through the Conservation Agreement, the CALFED agencies also have committed to spend at least \$150 million per year to implement the ERP.

The Conservation Agreement is especially important for NCCPA compliance because it memorializes the commitment of federal agencies to implement and adhere to the MSCS, thus ensuring CALFED’s program-level compliance with the NCCPA. As mentioned above, the NCCPA does not ordinarily apply to federal agencies. However, the participation of the federal CALFED agencies is essential to the success of the MSCS. Without the federal agencies’ commitment to implement the MSCS, it would not be a viable program-level NCCP.

PROGRAMMATIC BIOLOGICAL OPINIONS. Based on the MSCS, the PEIS/EIR, and other CALFED program-level documents, USFWS prepared the Programmatic Biological Opinion on the CALFED Bay-Delta Program, dated August 28, 2000 (Attachment 6a to the CALFED Programmatic Record of Decision [ROD]). NMFS prepared the CALFED Bay-Delta Program Programmatic Biological Opinion, dated August 28, 2000 (Attachment 6b to the CALFED ROD). In the programmatic biological opinions, each agency concludes that the Preferred Program Alternative will not jeopardize the continued existence of any listed species and will not adversely modify the critical habitat of any listed species. In other words, USFWS and NMFS conclude that, at the program level, the Preferred Program Alternative complies with Section 7. The USFWS programmatic biological opinion establishes that the Preferred Program Alternative can be implemented without FESA being violated with respect to the listed species within USFWS’s jurisdiction. The NMFS programmatic biological opinion has the same effect with respect to the listed species within its jurisdiction.

The programmatic biological opinions do not authorize incidental take of any species, nor do they authorize any specific CALFED action. However, once specific CALFED actions have been proposed, Section 7 consultations may be initiated for the actions under the simplified regulatory compliance process established in the MSCS.

For purposes of designing and implementing CALFED actions, it is important to understand the basis for the USFWS and NMFS programmatic biological opinions. The USFWS and NMFS “no-jeopardy” determinations are based on the assumption that the Preferred Program

Alternative will be implemented as described in the PEIS/EIR and the MSCS, and as further described and elaborated in the project description used by USFWS and NMFS included in the programmatic biological opinions.

Section 7 of FESA requires each biological opinion to include a detailed project description. To avoid any inconsistency and to simplify FESA compliance, USFWS and NMFS used the same project description in their programmatic biological opinions. However, in drafting the project description, USFWS and NMFS included certain details about implementation of the Preferred Program Alternative that are not explicit in the PEIS/EIR description of the Preferred Program Alternative. These details are, in effect, conditions for implementing several elements of the Preferred Program Alternative, particularly the ERP and the EWA. Failure to implement one of these details does not necessarily mean that a CALFED action will violate FESA. However, if the details in the project description used by USFWS and NMFS prove inaccurate (if they are not implemented), USFWS and NMFS will be required to re-evaluate the basis for their programmatic biological opinions and possibly issue new or revised programmatic biological opinions.

Perhaps the most significant details added to the USFWS and NMFS project description are the “ERP Milestones”, which specify ERP actions to be implemented during Stage 1.

CALIFORNIA DEPARTMENT OF FISH AND GAME APPROVAL AND SUPPORTING FINDINGS FOR THE MULTI-SPECIES CONSERVATION STRATEGY. The California Department of Fish and Game Approval and Supporting Findings for the CALFED Bay-Delta Program Multiple Species Conservation Strategy (NCCPA Program Approval) dated August 28, 2000, is Attachment 7 to the CALFED ROD. The NCCPA Program Approval is DFG’s determination that the MSCS satisfies the requirements of the NCCPA for a programmatic NCCP. In the NCCPA Program Approval, DFG determines that the MSCS identifies and provides for the regional or areawide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth. If implemented in accordance with the MSCS and the Conservation Agreement, the CALFED Program will achieve the goals of the MSCS and will comply with the NCCPA and CESA.

The NCCPA Program Approval does not authorize incidental take of any species, nor does it authorize any specific CALFED action. However, once specific CALFED actions have been proposed, incidental take authorization may be obtained for certain listed and unlisted species under the simplified regulatory compliance process established in the MSCS.

The DFG NCCPA Approval uses the same project description as the USFWS and NMFS programmatic biological opinions.

TIERED PROJECT-LEVEL COMPLIANCE: ACTION SPECIFIC IMPLEMENTATION PLANS

GENERAL PROJECT-LEVEL COMPLIANCE PROCESS. The MSCS outlines a project-level FESA and NCCPA compliance process for CALFED actions that is designed to be systematic, efficient, and predictable. The second-tier compliance process requires the use of ASIPs. An ASIP is an environmental review document created for the MSCS that incorporates the

informational requirements of FESA and the NCCPA in one format. An ASIP tiers from the program-level compliance documents and explains how a CALFED action implements and adheres to the programmatic conservation strategy described in the MSCS.

USFWS, NMFS, and DFG will assist and advise lead agencies/project proponents for CALFED actions during the preparation of ASIPs. USFWS, NMFS, and DFG also will coordinate their comments regarding each completed ASIP and will ensure that the requirements for compliance with FESA and the NCCPA are consistent and are not duplicative.

CALFED Program implementation, in conjunction with the MSCS and programmatic biological opinions, will provide benefits in subsequent project-specific consultations. Specifically, individual projects that qualify for consultation will be evaluated within the context of the Program as a whole, which includes major elements designed to improve the environmental baseline and lead to the recovery of targeted species. These major elements will be subject to on-going monitoring, evaluation, and the application of adaptive management. Project-specific biological opinions will take into account the environmental benefits that accrue from the CALFED Program. As a result, USFWS and NMFS anticipate that implementation of the overall CALFED Program will streamline the ESA compliance process and, as actions are taken that benefit listed species, will reduce the need for additional provisions to satisfy legal requirements.

Under FESA, project proponents may use ASIPs to obtain Section 10 incidental take permits for CALFED actions in certain circumstances (see below under [“CALFED Actions Implemented by State Agencies”](#) and [“Applicability of Section 10 of FESA”](#)). However, for most CALFED actions, ASIPs will serve as project-level biological assessments of CALFED actions for purposes of initiating a Section 7 consultation. Based on the ASIPs, USFWS and NMFS will prepare action-specific biological opinions.

Under the NCCPA, ASIPs will serve as project-level NCCPs. Based on the ASIPs, DFG will issue NCCPA findings and determinations regarding CALFED actions. If an ASIP is prepared in accordance with the program-level compliance documents, DFG will issue an NCCPA approval for the CALFED action(s) addressed in the ASIP. The NCCPA approval will allow the action to be implemented in compliance with the NCCPA and CESA. A project proponent may use an ASIP to obtain a CESA incidental take permit in certain circumstances (see below under [“Species Not Covered by the Program-Level Compliance Documents”](#)). However, for most CALFED actions, this will not be necessary and would be inconsistent with the MSCS.

FOCUS AREA. The MSCS was developed primarily to address CALFED actions that occur within a defined “focus area”. The MSCS focus area encompasses the legally defined Delta, Suisun Bay and Marsh, the Sacramento and San Joaquin Rivers and their tributaries downstream of major dams, and the potential locations of conveyance and water storage facilities. The species evaluated in the MSCS are species known to occur in this area.

Some CALFED actions implemented outside the MSCS focus area or within potential storage sites could adversely affect covered species. In such cases, the lead agencies/project proponents must prepare ASIPs (see “[Covered Species](#)” below).

CALFED actions that are implemented outside the MSCS focus area are also likely to affect species that are not covered by the program-level compliance documents; the MSCS does not specify conservation measures for such species. In addition, the MSCS does not contain conservation measures for many species present in potential locations of conveyance and water storage facilities that are not within the Delta, Suisun Bay and Marsh, or the Sacramento or San Joaquin Rivers and their tributaries. The MSCS offers little guidance on how to address impacts on any species not evaluated in the MSCS. An ASIP is not required for CALFED actions if they will not adversely affect a covered species. For such CALFED actions, regulatory approvals from USFWS, NMFS and DFG can be obtained through ordinary compliance processes.

SPECIES GOALS. The MSCS’s programmatic conservation strategy is designed to meet certain goals for each of the species evaluated in the MSCS. The species goals were used to develop the MSCS conservation measures. In general, the MSCS conservation goals are highest for listed species and sensitive species that are likely to be most affected by CALFED actions. For these species, the MSCS conservation measures are the most ambitious and the most restrictive. For listed species and sensitive species that are likely to be somewhat less affected by CALFED actions, the species goals are less ambitious and the measures somewhat less restrictive. For less sensitive species that are likely to be affected by relatively few CALFED actions, the species goals and conservation measures are relatively modest.

Each of the species evaluated in the MSCS was assigned one of three conservation goals. The highest goal is “Recover”. The Recover goal was assigned to species whose recovery depends on restoration of the Delta and Suisun Bay/Marsh ecosystems and for which the Preferred Program Alternative includes all or most of the actions necessary to recover the species. “Recover” means to arrest the species’ decline, neutralize threats to the species, and ensure its long-term survival in nature.

The goal “contribute to recovery” was assigned to species where CALFED actions are likely to affect only a limited portion of the species’ range and/or CALFED actions are likely to have limited effects on the species. For these species, the MSCS goal is to implement all actions included in the Preferred Program Alternative that are necessary for the recovery of the species. For most, if not all, of these species, actions beyond the scope of the Preferred Program Alternative will also be necessary for the species to be recovered fully.

The goal of “maintain” was assigned to species expected to be minimally affected by CALFED actions. For these species, the MSCS goal is to ensure that CALFED actions do not degrade the species’ status or contribute to the need to list the species. Many “maintain” species are not in decline, and the conservation measures for these species are not intended to achieve their recovery.

The MSCS includes goals and measures for species that are not listed or sensitive because it is intended to be comprehensive and applicable over the long term. The MSCS is

intended to prevent new listings of species and to ensure that, even if new species are listed, the MSCS will remain a viable regulatory compliance strategy. The MSCS anticipates that if any species addressed in the MSCS is subsequently listed under FESA, it can be included relatively easily in USFWS's or NMFS's list of covered species (see "Covered Species" below), without major revisions to the MSCS being needed and without lengthy delays. The MSCS also anticipates that some of the species addressed in the MSCS will meet the requirements of the NCCPA and can be included on DFG's list of covered species.

COVERED SPECIES. Covered species are the species covered by the program-level compliance documents described above under "[Program-Level Compliance for the CALFED Preferred Program Alternative](#)". A lead agency/project proponent that follows the MSCS ASIP process can obtain FESA and NCCPA authorizations for specific CALFED actions that will result in the take of covered species.

The MSCS evaluated the potential effects of the Preferred Program Alternative on 244 species. From the evaluated species, USFWS, NMFS, and DFG each identified the species under its jurisdiction for which the MSCS fulfilled applicable statutory requirements at the program level. USFWS, NMFS, and DFG each have a different list of covered species, in accordance with their different jurisdictions and statutory authorities. However, most evaluated species that are listed under FESA or CESA are MSCS covered species. Project-level approvals can be obtained from all three agencies using one ASIP that addresses all pertinent covered species.

Section 7 biological opinions can address only species listed and proposed for listing under FESA. The NMFS list of covered species is included in the NMFS programmatic biological opinion and is limited to species of anadromous fish that are listed and proposed for listing under FESA. The USFWS list of covered species is included in the USFWS programmatic biological opinion and includes all other species that are listed or proposed for listing under FESA that were evaluated in the MSCS.

DFG's list of covered species is included in the NCCPA Approval. The NCCPA allows DFG to authorize the take, under the authority of the California Fish and Game Code, of any species adequately conserved in an approved NCCP.

SPECIES NOT COVERED BY THE PROGRAM-LEVEL COMPLIANCE DOCUMENTS. Some CALFED actions may adversely affect only FESA- or CESA-listed species that are not covered species, or a combination of covered species and listed species that are not covered. For example, many actions implemented as part of CALFED's Watershed Program may occur outside of the MSCS focus area and may not affect any of the Covered Species, but may affect other listed species. For CALFED actions such as these, a lead agency/project proponent must comply with FESA and CESA without substantial guidance from the MSCS or other program-level compliance documents. In these cases, a lead agency/project proponent may follow the ASIP process, but is not required to do so. The substantive and procedural requirements and the necessary regulatory approvals or permits may be somewhat different for the listed species that are not covered species than for covered species. However, USFWS's, NMFS's and DFG's commitment to coordinate their review and comments regarding CALFED actions in the ASIP

process should make the ASIP process more systematic, efficient, and predictable than seeking regulatory approvals from the three agencies separately, whether or not covered species are involved.

If a CALFED action will affect both covered species and listed species that are not covered, the lead agency/project proponent must use the ASIP process to address adverse effects of the action on the covered species. Although it cannot rely on the program-level compliance documents for the listed species that are not covered, the lead agency/project proponent may fulfill FESA and CESA requirements for these species by adding the necessary information and analyses to the ASIP prepared for the covered species. The need to prepare separate FESA and CESA compliance documents can in this way be avoided.

Under FESA Section 7, an ASIP can serve as the biological assessment of a CALFED action for both covered species and other species that are listed or proposed for listing. USFWS and NMFS may use the ASIP to issue a biological opinion for the action that addresses both covered species and other listed species.

Under the NCCPA, DFG may authorize only the take of covered species. DFG cannot authorize the take of any other CESA-listed species in an action-specific NCCPA approval. If a CALFED action will take a CESA-listed species that is not a covered species, a CESA Section 2081 incidental take permit must be obtained. If the CALFED action will take only CESA-listed species that are not covered species, an ASIP is not required and the lead agency/project proponent must follow the standards and guidelines in 14 CCR 783 *et seq.* to obtain an incidental take permit. If the CALFED action will take both covered species and other species listed under CESA, both an action-specific NCCPA approval and a Section 2081 incidental take permit must be obtained. A single ASIP may be used to obtain an NCCPA approval and a Section 2081 incidental take permit. However, the lead agency or other entity implementing the CALFED action must ensure that the ASIP meets the standards and guidelines of 14 CCR 783 *et seq.*

INCORPORATING APPROPRIATE CONSERVATION MEASURES. The MSCS conservation measures are listed in Attachment E of the MSCS. They are divided into two types: measures to avoid, minimize, and compensate for adverse effects of the Preferred Program Alternative on NCCP communities and evaluated species, and measures to enhance NCCP communities and evaluated species that are not directly linked to the adverse effects of CALFED actions.

The first type of measure is intended to apply to all CALFED actions that may cause adverse effects on evaluated species and natural communities. The precise measures necessary to avoid, minimize, and compensate for the adverse effects of individual CALFED actions or groups of actions will depend on the scope, location, and timing of the action(s), as well as the current status, distribution, and needs of the affected species and habitats.

The second type of measure is derived from measures in the ERP, EWA, Water Quality, Levee System Integrity, and Science Program elements of the Preferred Program Alternative. These measures to enhance NCCP communities and evaluated species were explicitly or implicitly included in the Preferred Program Alternative, and the MSCS refined or added specificity or greater priority to certain measures. These specific proposed actions are identified

as conservation measures in the MSCS because they are important for purposes of FESA and NCCPA compliance.

It is essential to consider the basic difference between the two types of MSCS conservation measures. The first type—the avoidance, minimization, and mitigation measures—must be included in any CALFED action that may adversely affect a covered species. These conservation measures prescribe how individual CALFED actions should be designed and implemented. They are applied to proposed CALFED actions and are not implemented independently. The second type of measure—enhancement measures—is intended to affect the way CALFED actions are prioritized. These measures are selected CALFED actions that are inherently beneficial for conservation purposes and must be implemented for the MSCS to achieve its goals. Lead agencies are responsible for ensuring that the first type of conservation measure is included in CALFED actions. Implementation of the second type of conservation measure is the collective responsibility of the CALFED agencies and CALFED. The following two sections describe the application of the two types of conservation measures to individual CALFED actions or groups of actions.

AVOIDANCE, MINIMIZATION, AND COMPENSATION MEASURES. [Attachment E of the MSCS](#) includes one table of conservation measures for each group of evaluated species according to the MSCS’s species goals: “Recovery”, “contribute to recovery”, and “maintain”. The avoidance, minimization, and compensation measures are listed in the second column of these tables. The conservation measures that add detail to and prioritize CALFED actions (Type 2 conservation measures) are in the first column.

A lead agency/project proponent attempting to identify which avoidance, minimization, and compensation measures apply to a proposed CALFED action should first determine which species might be affected by the action. This may be accomplished as part of an initial study, environmental assessment, or general constraints analysis for the action. Once a list of potentially affected species is developed, it should be compared with USFWS, NMFS, and DFG lists of covered species. For each covered species potentially affected by the action, the lead agency should consult the tables in Attachment E of the MSCS to determine which measures the MSCS prescribes for such species. Attachment E includes conservation measures for all 244 species evaluated in the MSCS; however, lead agencies are required to implement only the measures for covered species.

For each covered species potentially affected by a CALFED action, the CALFED lead agency must include appropriate avoidance, minimization, and compensation measures from the MSCS table of conservation measures.

Many of the avoidance, minimization, and compensation measures are quite general and provide flexibility in their application. Lead agencies/project proponents should consult with USFWS, NMFS, or DFG, as appropriate, to determine how to apply them. However, even the most general measures identify mitigation priorities that may be used to inform the design of CALFED actions. More specific measures should be given special attention because they allow less flexibility in their application.

The MSCS requires that actions completely avoid the take of certain species. These species are extremely rare or have a special regulatory status apart from, or in addition to, being listed under FESA or CESA. For example, the Fish and Game Code prohibits the take of “fully protected species” (see Fish and Game Code Sections 3511, 4700, 5050, and 5515). Fully protected species need not be listed under CESA to be protected by this take prohibition. State law does not allow DFG to issue incidental take permits for fully protected species, as CESA allows for listed species. When siting CALFED actions, lead agencies/project proponents should make careful note of the species for which take must be avoided.

Ideally, lead agencies/project proponents should include appropriate MSCS conservation measures in the project description of each CALFED action. This will allow for the most streamlined and efficient compliance process. If all necessary conservation measures are included in the project description used for purposes of NEPA and CEQA compliance, the ASIP process may be conducted concurrently with the NEPA and CEQA compliance processes. Rather than imposing new mitigation measures or project design specifications for FESA and NCCPA compliance, USFWS, NMFS, and DFG can approve a project as proposed under CEQA and NEPA. To ensure that the necessary conservation measures are included in the project description at this early stage of project review, the lead agency/project proponent should confer with USFWS, NMFS, and DFG immediately after an initial study or environmental assessment has been prepared.

ENHANCEMENT MEASURES. The MSCS conservation measures intended to enhance NCCP communities and evaluated species and not directly linked to the adverse effects of CALFED actions are described in the first column of the tables in Attachment E of the MSCS. As explained above, these measures are not intended to mitigate the effects of CALFED actions. They are intended generally to assign priority to various Preferred Program Alternative—implementing actions. Lead agencies/project proponents should refer to the enhancement measures when selecting and designing CALFED actions. Where practicable, CALFED actions that implement or include MSCS enhancement measures should be given a higher priority than actions that do not. While it may not be necessary to implement any particular enhancement measure to meet FESA or NCCPA requirements for any individual CALFED action, the most effective way to ensure that the enhancement measures are ultimately implemented is to develop or select for implementation those CALFED actions that include them.

ECOSYSTEM RESTORATION PROGRAM ACTIONS. Reviewing the MSCS enhancement measures is especially important during the design or selection of any ERP action. The MSCS does not require that all ERP actions include the implementation of enhancement measures. However, where practicable, ERP actions should incorporate or reflect the priorities stated in MSCS enhancement measures. For example, the first enhancement measure identified in Attachment E of the MSCS is:

The geographic priorities for implementing ERP actions to protect, enhance, and restore saline emergent wetlands and associated habitats for the Suisun ornate shrew should be (1) western Suisun Marsh, (2) Napa marshes and eastern Suisun Marsh, and (3) Sonoma marshes and Highway 37 marshes west of Sonoma Creek.

This enhancement measure does not require all ERP actions benefiting the Suisun ornate shrew to be implemented in the geographic priority areas. Additionally, it is not a condition of any particular CALFED action that an ERP action be implemented in the western Suisun Marsh or other priority area. However, when selecting the location of ERP actions that restore or enhance saline emergent wetlands and associated habitats for the Suisun ornate shrew, the CALFED agencies should generally give priority to these three geographic areas. Before proposing any ERP action intended to protect, restore, or enhance Suisun ornate shrew habitat, the lead agency/project proponent should generally review the MSCS enhancement measures for the Suisun ornate shrew to see whether any can be incorporated into the action.

When selecting or designing ERP actions, lead agencies/project proponents should also consult the ERP milestones adopted by USFWS, NMFS, and DFG (see the USFWS and NMFS programmatic biological opinions and the NCCPA Approval). For example, USFWS and DFG have specified that the restoration of 7,000 acres of saline emergent wetland in the Suisun Bay and Marsh Ecological Management Unit during Stage 1 is a necessary milestone for the ERP program. This milestone is intended to benefit the Suisun ornate shrew and other species. Therefore, although not all ERP actions are required to contribute to this milestone, a lead agency/project proponent should give additional priority to potential ERP actions that contribute to the milestone.

An ERP action that would restore saline emergent wetlands within the Suisun Bay and Marsh Ecological Management Unit and that is located within one of the MSCS geographic priority areas during Stage 1 would clearly reflect the priorities of the program-level compliance documents and would help fulfill the Preferred Program Alternative's requirements for compliance with FESA and the NCCPA. By doing so, the ERP action would help ensure that USFWS, NMFS, and DFG will not be required to re-evaluate or revise the programmatic biological opinions or the NCCPA Approval.

OTHER ACTIONS. MSCS enhancement measures also pertain to elements of the Preferred Program Alternative other than the ERP. Several of the enhancement measures pertain to the EWA and the Water Management Strategy. These enhancement measures are reflected in the [Environmental Water Account Operating Principles Agreement \(EWA Agreement\)](#), which is attached to the CALFED ROD. In other words, by adhering to the EWA Agreement, the CALFED agencies should implement the MSCS enhancement measures pertaining to the EWA and the Water Management Strategy. Fewer MSCS enhancement measures pertain to the Water Quality Program, the Levee System Integrity Program, the Initial Storage Investigation, and other elements of the Preferred Program Alternative. Where practicable, lead agencies/project proponents should review the MSCS enhancement measures and incorporate or reflect their priorities in actions developed for these elements.

CALFED ACTIONS IMPLEMENTED BY FEDERAL AGENCIES. If a CALFED action implemented by a federal agency will result in the take or adversely affect a covered species, the federal agency must comply with the program-level compliance documents by preparing an ASIP and following the environmental review process prescribed in the MSCS. The ASIP will serve as the biological assessment of the federal agency's action under FESA Section 7, and

USFWS or NMFS will prepare an action-specific biological opinion for the action based on the ASIP.

As mentioned earlier, CESA and the NCCPA generally do not apply to federal agencies. No permit or authorization is required from DFG under CESA or the NCCPA for CALFED actions implemented entirely by a federal agency. However, under the Conservation Agreement, federal CALFED agencies must implement and adhere to the MSCS for all CALFED actions that may adversely affect any covered species, including species on DFG's list of covered species. The MSCS requires all entities implementing CALFED actions to prepare an ASIP that includes information and analysis required by the NCCPA and also includes MSCS avoidance, minimization, and compensation measures for species on DFG's list of covered species. If the ASIP fulfills the requirements of the NCCPA, DFG will issue an action-specific NCCPA approval for the federal agency action.

CALFED ACTIONS IMPLEMENTED BY STATE AGENCIES. As with federal agencies, a State agency implementing a CALFED action must comply with the program-level compliance documents by preparing an ASIP and following the environmental review process prescribed in the MSCS if the action will take or adversely affect a covered species. The ASIP will serve as the project-specific NCCP for the State agency's action under the NCCPA and, if the ASIP meets NCCPA requirements, DFG will issue an action-specific NCCPA approval for the action.

Section 7 of FESA applies to any action implemented by a State agency that is approved, funded, or carried out, in whole or in part, by a federal agency and that may adversely affect a species listed under FESA. If Section 7 applies to a CALFED action implemented by a State agency, the ASIP prepared for the action will serve as the biological assessment of the action, and USFWS and/or NMFS will prepare an action-specific biological opinion for the action based on the ASIP.

If Section 7 does not apply to a State agency action but the action will take a species listed under FESA, the State agency must obtain an incidental take permit for the action under FESA Section 10. Where CALFED actions are concerned, this means that the ASIP prepared for the action must address the requirements of Section 10, including the requirement to prepare an HCP. If the action will also take or adversely affect a species on DFG's list of covered species, the State agency must also include appropriate MSCS conservation measures for these species and submit the ASIP for DFG's approval. ASIPs can be used to fulfill the requirements of both Section 10 and the NCCPA.

If the action will take or adversely affect a species on DFG's list of covered species, an ASIP must be prepared for the action whether or not a permit or authorization is required under FESA. However, if Section 7 of FESA does not apply to a CALFED action implemented by a State agency and the action will not involve the take of or adversely affect a species listed under FESA, no permit or authorization under FESA is required for the action and no consultation with USFWS or NMFS is required. In such a case, therefore, the ASIP need not address the requirements of FESA and need not be distributed to USFWS or NMFS for review. In this circumstance, the ASIP must only address the requirements of the NCCPA and, if applicable, CESA for DFG's covered species.

NEED FOR AN IMPLEMENTING AGREEMENT. For each ASIP, an implementing agreement will be required that establishes the commitments and responsibilities necessary for implementation of the ASIP. The implementing agreement must be executed by the agency or private entity that will implement the CALFED action addressed in the ASIP and by DFG. DFG will provide an implementing agreement template that may be used for most CALFED actions.

An implementing agreement is required for each ASIP to ensure that it is implemented in compliance with the NCCPA. Because compliance with the NCCPA is not mandatory—i.e., the NCCPA planning process is a *voluntary* alternative to the CESA incidental take permitting process—an implementing agreement is necessary to allow DFG to enforce each ASIP. If DFG were unable to enforce an ASIP, it could not issue an action-specific NCCPA approval based on the ASIP.

FESA Section 7 does not require an implementing agreement for actions addressed in biological opinions. However, an implementing agreement ordinarily is necessary for actions subject to FESA Section 10. For these actions, the implementing agreement establishes the commitments and responsibilities for implementation of the HCP required by Section 10. For CALFED actions, the implementing agreement used to comply with the NCCPA can also fulfill the need for an implementing agreement under FESA Section 10 if USFWS or NMFS, as appropriate, is consulted during its preparation.

APPLICABILITY OF SECTION 10 OF FESA. As mentioned above, FESA Section 10 will apply to a CALFED action if the action is not authorized, funded, or carried out by a federal agency, and if the action will take a species listed under FESA. For example, if a private entity proposes to implement an ERP action using only State, local, and private funding sources, and will not require a federal permit or approval (other than a FESA permit or approval) and the action will take a species listed under FESA, Section 10 will apply to the action. The private entity would then be required to obtain an incidental take permit. USFWS, NMFS, or both, as appropriate, can authorize the incidental take of covered species under FESA Section 10 based on the MSCS and ASIPs submitted by the proponents of specific CALFED actions. Among other things, the ASIP would be an HCP. The ASIP could tier from the program-level compliance documents and would be required to include appropriate MSCS conservation measures. The ASIP would also be subject to the more complex procedural and substantive requirements that apply to incidental take.

Nonfederal CALFED agencies and implementing entities may also elect to obtain a Section 10 incidental take permit for CALFED actions that are subject to Section 7. In this circumstance, compliance with both Section 7 and Section 10 would be necessary. In this case, the specific identified actions to be conducted by the Federal agency during the implementation of the HCP should be consulted on as part of the Section 7 consultation conducted for the HCP. This allows the USFWS and/or NMFS to conduct one formal consultation that incorporates the actions for the HCP and any specified or identified cooperative Federal action into one biological opinion. The single biological opinion issued by the USFWS and/or NMFS would help eliminate duplication because it would address both the Federal action and the non-Federal action, and it

would include an incidental take permit that authorizes any incidental take by the Section 10 permittee.

While this would increase the complexity and duration of the compliance process, there are some benefits to FESA Section 10 compliance that may warrant the additional regulatory burden. Incidental take permits under Section 10 may cover both species that are listed under FESA and specified species that are not yet listed, in the event they become listed. In addition, Section 10 incidental take permits are subject to the “No Surprises Rule”, which ensures that additional restrictions on the use of land or water will not be imposed after permit issuance, except under certain limited circumstances. Section 10 can therefore provide long-term regulatory stability under FESA for nonfederal entities willing to fulfill Section 10’s substantive and procedural requirements.

APPLICABILITY OF SECTION 2081 OF CESA. CESA Section 2081 will apply only to CALFED actions that are implemented by a State or local agency, or a private entity, that will take a species listed under CESA that is not included in DFG’s list of covered species (see [“Covered Species”](#) above). Section 2081 will most likely apply to CALFED actions implemented outside of the MSCS focus area or in potential locations of conveyance and water storage facilities that are not within the Delta, Suisun Bay and Marsh, or Sacramento or San Joaquin Rivers and their tributaries.

The MSCS and the NCCPA Approval prescribe a process for compliance with the NCCPA that will allow CALFED actions to be implemented in compliance with CESA and the NCCPA. The NCCPA Approval establishes the Preferred Program Alternative’s program-level compliance under the NCCPA and CESA for all species listed under CESA that are known to occur in the MSCS focus area, with the exception of the potential locations of water storage facilities and associated conveyance facilities. The MSCS and the NCCPA Approval apply to all CALFED actions that may adversely affect any of the species on DFG’s list of covered species. Therefore, few, if any, CALFED actions carried out in the MSCS focus area are likely to require an incidental take permit under CESA. As mentioned above, any CALFED action that requires a CESA incidental take permit must fulfill the substantive and procedural requirements of 14 CCR 783 *et seq.*

WHO NEEDS TO COMPLY?

CALFED agencies that approve, fund, or carry out any CALFED action must ensure that the action implements and adheres to the FESA and NCCPA program-level compliance documents and the MSCS if the CALFED action may affect any covered species. In most cases, the CALFED agencies that are the lead agencies under CEQA or NEPA will have the principal responsibility for ensuring compliance. If neither the CEQA nor the NEPA lead agency is a CALFED agency, the CALFED agency or agencies that approve or fund the action must ensure compliance.

HOW LONG DOES THE APPROVAL PROCESS TAKE?

The length of the FESA and NCCPA approval process will depend on the degree to which the FESA and NCCPA approval process occurs concurrently with the NEPA and CEQA review process. If an ASIP that fulfills the requirements of the MSCS is included as part of draft NEPA and CEQA environmental review documents, the FESA and NCCPA approval process can be completed at approximately the same time that the NEPA and CEQA process is completed. The time required to prepare an ASIP will vary greatly depending on the scope, duration, and complexity of each CALFED action and its impacts on covered species and natural communities.

The Section 7 approval process, if applicable, will be initiated at the time a completed ASIP is submitted to USFWS or NMFS accompanied by a written request to initiate consultation. The Section 7 consultation process usually is completed 135 days from the date it is initiated, but may be extended for large or complex actions. From the date that formal consultation is initiated, the USFWS and/or NMFS is allowed 90 days to consult with the agency and applicant (if any) and 45 days to prepare and submit a biological opinion; thus a biological opinion is submitted to the Federal agency within 135 days of initiating formal consultation. The 90-day consultation period can be extended by mutual agreement of the Federal agency and the USFWS and/or NMFS; however, if an applicant is involved, the consultation period cannot be extended more than 60 days without the consent of the applicant.

If a FESA Section 10 incidental take permit must be obtained for a CALFED action, the approval process may be considerably longer than with the Section 7 consultation process. However, the NEPA documentation for a Section 10 permit, if appropriately structured, can also serve as the NEPA documentation for a project, thus eliminating a duplicate step. FESA does not prescribe a time limit for the incidental take permitting process. A project proponent wishing to obtain an incidental take permit must develop an HCP. Development of an HCP may require 6 months to several years, but it may be initiated before the CEQA and NEPA environmental review process begins.

Like FESA Section 10, the NCCPA does not prescribe time limits for NCCPA planning. Under the MSCS and the NCCPA Approval, a lead agency/project proponent may achieve compliance with the NCCPA by preparing an ASIP that meets the requirements of the NCCPA. As noted, the time required to prepare an ASIP will vary greatly depending on the CALFED action for which it is prepared.

If a CESA Section 2081 incidental take permit is required, the permitting process must be concluded within 150 days from the date the CEQA lead agency approves the action, or the date DFG receives a completed permit application, whichever is later. If DFG is the lead agency for the proposed action, the permitting process must be completed within 180 days from the date that DFG receives a complete application.

WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?

An ASIP must include:

- a detailed project description of the CALFED action or group of actions to be implemented, including site-specific and operational information;
- a list of covered species and any other special-status species that occur in the action area;
- an analysis identifying the direct, indirect, and cumulative impacts on the evaluated species and other special-status species occurring in the action area (along with an analysis of impacts on any FESA-designated critical habitat) likely to result from the proposed CALFED action or group of actions, as well as actions related to and dependent on the proposed action;
- measures the implementing entity will undertake to avoid, minimize, and compensate for such impacts and, as appropriate, measures to enhance the condition of NCCP communities and covered species, with a discussion of:
 - a plan to monitor the impacts and the implementation and effectiveness of these measures,
 - the funding that will be made available to undertake the measures, and
 - the procedures used to address changed circumstances;
- measures the implementing entity will undertake to provide commitments to cooperating landowners, consistent with the discussion in Section 6.3.5 of the MSCS;
- a discussion of alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized;
- additional measures USFWS, NMFS, and DFG may require as necessary or appropriate for compliance with FESA, CESA, and the NCCPA; and
- a description of how and to what extent the action or group of actions addressed in the ASIP will help CALFED achieve the MSCS goals for the affected covered species (i.e., how the ASIP implements the MSCS).

The depth and level of detail required to fulfill each of these information requirements will vary depending on whether Section 7 or Section 10 of FESA applies to the CALFED action addressed. For example, if FESA Section 10 applies to the action, the degree to which the ASIP incorporates procedures used to address changed circumstances will be much greater than for actions subject to FESA Section 7.

For detailed guidance on completing ASIPs, see CALFED's guidebook on preparation and processing of ASIPs.

WHAT DOES THE APPLICATION AND EVALUATION PROCESS ENTAIL?

The FESA and NCCPA compliance process prescribed by the program-level compliance documents and the MSCS is relatively simple. For each CALFED action that may adversely affect a covered species, an ASIP must be prepared and submitted to USFWS, NMFS, or DFG, as appropriate, for review. An ASIP is not required and no further consultation is required under FESA for CALFED actions if a Federal agency determines, with the written concurrence of the USFWS, NMFS, or both, as appropriate, that an action may affect but is not likely to adversely affect listed species or critical habitat. If Section 7 applies to the action addressed in the ASIP, the ASIP should be accompanied by a written request to initiate consultation under Section 7 from the federal agency that will approve, fund, or carry out the action. USFWS and/or NMFS will review the ASIP and issue an action-specific biological opinion based on the ASIP.

If FESA Section 10 applies to the action, the ASIP should include an HCP and should be submitted to USFWS and/or NMFS along with an incidental take permit application. This will initiate the incidental take permitting process prescribed in FESA regulations. USFWS and/or NMFS will determine whether the ASIP fulfills the requirements of Section 10 and, if it does, will issue an incidental take permit based on the ASIP. For most CALFED actions subject to Section 10, a draft implementing agreement will be required and should be included with the ASIP and permit application.

Under the NCCPA, the ASIP and an implementing agreement should be submitted to DFG. DFG will review the ASIP and the implementing agreement to determine whether they fulfill the requirements of the NCCPA. If they do, DFG will sign the implementing agreement and issue an action-specific NCCPA approval for the action addressed in the ASIP.

If CESA Section 2081 applies, the ASIP may be submitted with a CESA incidental take permit application. DFG will determine whether the ASIP fulfills the requirements of Section 2081 and, if it does, will issue an incidental take permit based on the ASIP.

The program-level compliance documents and the MSCS anticipate and create an opportunity for informal consultation with USFWS, NMFS, and DFG. Ideally, the ASIP developed for a proposed action will have been reviewed informally by each agency whose covered species may be affected by the action before being formally submitted to the agency. If this occurs, the ASIP may be reviewed formally by USFWS, NMFS, and DFG during the NEPA and CEQA environmental review process for the proposed action, and the agencies can issue necessary FESA and NCCPA authorizations or approvals at or near the completion of the NEPA and CEQA process.

DOES THE PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?

Before issuing an NCCPA approval or CESA incidental take permit, DFG must comply with CEQA. In most cases, DFG will be a CEQA responsible agency and will participate in the environmental review process conducted by the CEQA lead agency. In the unlikely event a proposed CALFED action is not otherwise subject CEQA, DFG's issuance of an action-specific NCCPA approval or CESA incidental take permit will trigger the need for compliance with

CEQA, and DFG will need to act as the CEQA lead agency and ensure that the proposed action complies with CEQA.

USFWS and NMFS are not ordinarily required to comply with NEPA before issuing a Section 7 biological opinion. An exception applies if the biological opinion adds conditions, requirements, or measures to the action that were not contemplated as part of the NEPA review of the project, and that may result in significant environmental impacts.

USFWS and NMFS must comply with NEPA before issuing a Section 10 incidental take permit. In many cases, USFWS or NMFS will be a cooperating agency under NEPA and will participate in the environmental review process conducted by the NEPA lead agency. If USFWS or NMFS is the only federal agency that will authorize or fund a proposed CALFED action, USFWS or NMFS must act as the NEPA lead agency and ensure that the proposed action complies with NEPA. In other words, as in the case of DFG's issuance of an action-specific NCCPA approval, in the unlikely event a proposed CALFED action is not otherwise subject to NEPA, the USFWS or NMFS issuance of an incidental take permit will trigger the need for compliance with NEPA.

WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?

The program-level compliance documents and the MSCS provide the opportunity for a more efficient, systematic, and predictable FESA and NCCPA compliance process. The following are recommendations for taking greatest advantage of this opportunity:

1. Consult informally with USFWS, NMFS and DFG at the time the initial study, environmental assessment, or general constraints analysis is conducted. USFWS, NMFS, and DFG can provide advice and guidance about what covered species are likely to be affected and can identify issues for consideration during design and development of the CALFED action. Continue to involve the agencies during action planning and ASIP development.
2. Review information provided in the MSCS and program-level compliance documents during the early stages of project design and review to ensure consistency with those documents. Specifically, review the project description used for the program-level compliance documents to ensure consistency.
3. Start early to survey for covered species and natural communities using survey protocols published by USFWS, NMFS, and DFG. Surveying may not be necessary for terrestrial vertebrates and invertebrates if these species are presumed to exist at the site on which the action will be implemented.
4. Design the action and construction plans and specifications to avoid the habitat of covered species.

5. Develop the ASIP before or concurrent with draft NEPA and CEQA documents. Incorporate applicable MSCS conservation measures in the project description for the action.
6. Include in the ASIP information necessary for a Fish and Wildlife Coordination Act report, where applicable. This will help minimize the time necessary for USFWS's review of the ASIP.

Additional recommendations for facilitating compliance with this process are provided in [Volume 1, Chapter 3](#) under “Integrating Environmental Permitting into the NEPA/CEQA Process”.



Go to Next Regulation